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No. 88-548

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT P. NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may release grand jury materials to a private party for the purpose of conducting historical research.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) and the order of the district court (Pet. App. 7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1988. A petition for rehearing was denied on July 1, 1988. Pet. App. 4a-6a. The petition for a writ of certiorari was filed on September 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a professor at the University of Pittsburgh, is writing a biography of Owen Lattimore, a China scholar in the 1940's who was a defendant in two federal criminal cases in the early 1950's. On July 6, 1987,

petitioner filed a motion under 28 U.S.C. 1651 in the United States District Court for the District of Columbia to unseal the transcripts of grand jury proceedings in 1952 and 1954 that resulted in the two indictments of Lattimore.[1] Petitioner submitted affidavits attesting to the value of the grand jury materials for historical research, and he argued that there no longer was any interest in grand jury secrecy, because the prosecution had terminated more than 30 years ago and most of the witnesses involved were now dead. Pet. 4-5; Gov't C.A. Mot. for Summary Aff. 1, 3.

After receiving the government's opposition to petitioner's request, the district court denied petitioner's application. Pet. App. 7a. The court of appeals affirmed in an unpublished order. Pet. App. 1a-3a. It concluded that Fed. R. Crim. P. 6(e)(3), which authorizes the disclosure of grand jury materials under certain circumstances, does not permit a court to disclose grand jury materials to a "private party for historical research purposes." Pet. App. 2a. Relying on *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 217 (1979), the court observed that secrecy is

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[1] In the 1952 case, the district court dismissed four of the seven counts in the indictment. *United States* v. *Lattimore*, 112 F. Supp. 507 (D.D.C. 1953). The court of appeals affirmed that decision as to two counts and reversed as to others. *United States* v. *Lattimore*, 215 F.2d 847 (D.C. Cir. 1954) (en banc). The government dismissed the remaining counts of the indictment in 1955. In the 1954 case, the district court dismissed the entire indictment, *United States* v. *Lattimore*, 127 F. Supp. 405 (D.D.C. 1955), and the court of appeals upheld that judgment by a 4-4 vote. *United States* v. *Lattimore*, 232 F.2d 334 (D.C. Cir. 1955) (en banc).

Upon receipt of the petition for release filed by petitioner in district court, the government contacted various depositories in an effort to locate the records. The transcript of the 1952 proceedings was located, but the transcript of the 1954 proceedings was never found. Gov't C.A. Mot. for Summary Aff. 2.

necessary for the proper functioning of the grand jury system, and that a private party bears a heavy burden to show a "particularized need" that outweighs the public interest in secrecy and the possible effects on future grand jury proceedings. Pet. App. 2a-3a. A "claim of historical importance, without more," is not sufficient to justify disclosure of grand jury transcripts, the court of appeals ruled. The court therefore upheld the district court's denial of petitioner's application. Pet. App. 3a.

ARGUMENT

Petitioner does not challenge the court of appeals' ruling that Rule 6(e)(3) does not authorize the disclosure of grand jury materials to a private party who requests the materials for the purpose of conducting historical research. Instead, he contends that the district court should have ordered the disclosure of the requested transcript in the exercise of the court's inherent supervisory power. According to petitioner, a district court has inherent authority to release grand jury materials whenever the court decides that it is in the public interest to do so. That claim does not warrant review by this Court.

Rule 6(e)(2) "codifies the traditional rule of grand jury secrecy" (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983)), requiring, for example, the grand jurors and attorney for the government not to disclose matters occurring before the grand jury "except as otherwise provided for in these rules." Rule 6(e)(3) specifies certain limited instances in which the disclosure of grand jury materials otherwise prohibited by the Rule may be made. Disclosure may be made to a government attorney and to other necessary government personnel (federal or state) in the performance of the attorney's duty to enforce the federal criminal law (Rule 6(e)(3)(A)(i) and (ii), (B)), to a

party to another judicial proceeding (Rule 6(e)(3)(C)(i)), to the defendant in a criminal case for the purpose of moving to dismiss the indictment on the basis of, for example, misconduct by the prosecutor before the grand jury (Rule 6(e)(3)(C)(ii)), to another federal grand jury (Rule 6(e)(3)(C)(iii)), or to an appropriate state official to enforce a state criminal law (Rule 6(e)(3)(C)(iv)). Thus, the only exception for the disclosure of grand jury materials outside the context of a criminal case is Rule 6(e)(3)(C)(i), which is limited to those cases where a judicial proceeding or antecedent administrative proceeding is pending. See *United States* v. *Baggot*, 463 U.S. 476 (1983) (disclosure not permitted to the IRS during an audit).

Rule 6(e) contains no general exception for disclosures in the public interest, nor is there a provision authorizing a district court to waive or to make an exception to the general secrecy obligation created by Rule 6(e). It is therefore clear that petitioner has no right to the disclosure of the grand jury transcript under the terms of Rule 6(e)(3), the Rule that specifically provides for disclosure of grand jury materials.

Rather than relying on the Rule that governs disclosure, petitioner invokes the "inherent authority" of district courts to order the disclosure of grand jury materials even when Rule 6(e)(3) would not permit it. While courts in a few unusual cases have permitted disclosure on that basis, those courts have emphasized that ordering disclosure based on courts' "inherent authority" rather than on Rule 6(e) is confined to "special" or "exceptional" circumstances. Because there is nothing "exceptional" about a request to examine grand jury materials based on interest in their contents—whether the interest is scholastic or otherwise—the cases recognizing the courts' "inherent authority" to order disclosure in certain limited circumstances afford no aid to petitioner.

Petitioner first relies on *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973). In that case, a newspaper reported that Mario Biaggi, a candidate for Mayor of New York City, had invoked his privilege against compelled self-incrimination in response to numerous questions when he testified before a federal grand jury. Biaggi denied that he had done so, and he sought to have a court examine the transcript to determine whether he had invoked his privilege in connection with questions about his personal finances and assets. The government then moved in district court for the disclosure of the full transcript (with the names of third parties redacted), and Biaggi, after initially opposing the government's motion, asked for the transcripts to be disclosed in their entirety, without any redaction. The district court granted the government's motion, but denied Biaggi's. The Second Circuit affirmed the district court's ruling.

The court of appeals noted that there was no continuing interest in secrecy since both the government and Biaggi, the only witness, had requested disclosure. 478 F.2d at 493. The court further noted that Biaggi's original request for a court to examine the transcripts "was framed, whether wittingly or not, in such a manner as to create a false impression" that Biaggi had not invoked his privilege at all, which was not true. *Id.* at 494. In holding that disclosure was permissible under those circumstances, however, the court emphasized that "[o]ur decision should * * * not be taken as demanding, or even authorizing, public disclosure of a witness' grand jury testimony in every case where he seeks this and the Government consents." *Ibid.* Rather, the court explained that its ruling rested on "the exercise of a sound discretion under the special circumstances of this case." *Ibid.*[2]

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[2] The Second Circuit clearly meant what it said when it emphasized that the court's "inherent authority" to order disclosure was

Another case on which petitioner relies, *In re Petition to Inspect and Copy Grand Jury Materials,* 735 F.2d 1261 (11th Cir.), cert. denied, 469 U.S. 884 (1984), underscores the limited scope that the courts have given to the "inherent authority" rationale as a basis for permitting disclosure of matters occurring before the grand jury. That case involved an investigation of Judge Alcee Hastings conducted by the Investigating Committee of the Judicial Council of the Eleventh Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. 372. The court of appeals ruled that the district court could order the disclosure of the grand jury materials of the criminal investigation of Judge Hastings to the Investigating Committee as an exercise of the court's inherent supervisory authority over the grand jury. The court, however, carefully limited its holding to the exceptional circumstances of that case. Although the court of appeals found that disclosure was not authorized by any of the specific disclosure provisions of Rule 6(e)(3), the court noted that the Investigating Committee's request made an especially compelling case for disclosure, for several reasons. First, the court found that the statute authorizing the Investigating Committee to "conduct an investigation as extensive as it considers necessary" (28 U.S.C. 372(c)(5)) strongly suggested that Congress intended the Committee to have access to all available evidence, including the product of grand jury proceedings. 735 F.2d at 1269. Second, the court observed that the legislative history of the Act, "[w]hile cryptic, * * * is fairly susceptible to the interpretation that Congress believed that the [district] court could and should

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limited to exceptional cases. That court has not invoked the *Biaggi* rationale in any case since *Biaggi* was decided.

give the investigating judges access to grand jury materials." *Id.* at 1270. Third, the court found a "close correspondence" between disclosure to the Investigating Committee and disclosure of the type permitted under Rule 6(e)(3)(C)(i), which authorizes the district court to disclose grand jury materials "preliminarily to or in connection with a judicial proceeding." 735 F.2d at 1271-1272. Finally, the court noted that the "unique composition" of the Investigating Committee, which consisted entirely of federal judges, helped ensure that the materials would be handled discreetly. *Id.* at 1269.

While authorizing the disclosure of the materials in that case, the court emphasized that the courts "must adhere to Rule 6(e) in 'garden variety' petitions for grand jury disclosure," because Rule 6(e) "was intended to provide a reliable statement of the law in this area, and would be rendered meaningless if departures were freely sanctioned." Only in "exceptional circumstances consonant with the rule's policy and spirit" would a court be permitted to go beyond the terms of Rule 6(e). 735 F.2d at 1269. Contrary to petitioner's submissions, the Eleventh Circuit did not sanction a general exception to Rule 6(e) allowing disclosure of grand jury materials whenever a district court believes it to be in the public interest, but only a very narrow exception to the provisions of Rule 6(e)(3). That exception cannot be stretched to include a claim such as petitioner's, which is based on a private person's historical interest in the subject matter of the grand jury's investigation—an interest that could be asserted by virtually any person.[3]

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[3] The other Eleventh Circuit cases cited by petitioner are also inapposite. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438 (1987), a case related to the Investigating Committee's disclosure request, involved the disclosure of the same grand jury materials to the House Judiciary Committee during its impeachment proceedings against Judge Hastings. That decision does not assist petitioner,

Nor do the Seventh Circuit cases cited by petitioner aid his position. *In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1088 (1982), vacated in part, 717 F.2d 1136 (7th Cir. 1983), and *In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1236 (7th Cir. 1981), aff'd *sub nom. United States* v. *Baggot*, 463 U.S. 476 (1983), both stated in dictum that a court "may have some discretion in rare situations" to order disclosure in circumstances not covered by Rule 6(e) (662 F.2d at 1235-1236), and that a court "may not always be bound by a strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice." 662 F.2d at 1236; 687 F.2d at 1088. But the Seventh Circuit did not act on that dictum in either case. On the contrary, the court in both cases ruled that the district court had no inherent authority to disclose grand jury materials to the IRS, and that disclosure would not be permitted unless authorized by Rule 6(e)(3). *Miller*, 687 F.2d at 1088; *Baggot*, 662 F.2d at 1236. Moreover, the court made clear that a district court's discretion under the "inherent authority" rationale is "strictly limited" (662 F.2d at 1236) and would not permitted to serve as a routine means of evading the limits imposed by Rule 6(e). Like the Second and Eleventh Circuit decisions, the Seventh Circuit cases afford no support to

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because the parties agreed that a Senate impeachment trial is a "judicial proceeding" and that a House impeachment inquiry is "preliminary to" the Senate trial, for purposes of the exception in Rule 6(e)(3)(C)(i). 833 F.2d at 1440-1441. The only question in that case was whether the House Committee on the Judiciary had made a sufficient showing of particularized need for the grand jury materials. *Id.* at 1441-1446. *In re Grand Jury Proceedings*, 841 F.2d 1048 (1988), involved a later request for different grand jury materials by the House Judiciary Committee, and therefore is inapposite for the same reasons.

petitioner's submission that the "inherent authority" rationale provides a general exception to the restrictive terms of Rule 6(e)(3).[4]

Contrary to petitioner's contention, there is no conflict among the circuits on the issue presented in this case. The Court of Appeals for the District of Columbia Circuit has not rejected the "inherent authority" rationale for disclosure in all cases, as petitioner contends. In *Haldeman* v. *Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), the court agreed with the district court's determination that Rule 6(e) did not bar the disclosure of grand jury materials to the House Committee that was considering the impeachment of President Nixon. See 501 F.2d at 715. Nor has the Fifth Circuit done so. In the case of *In re J. Ray McDermott & Co.*, 622 F.2d 166 (1980), the Fifth Circuit held that a regulatory agency could not obtain grand jury materials based on its authority to conduct administrative investigations. Such disclosure, the court held,

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[4] *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973), is of no help to petitioner whatsoever. In a footnote, the court in that case stated in passing that a court can direct disclosure of grand jury material under Rule 6(e) "once the good cause, as used in Rule 34, has been demonstrated." 484 F.2d at 796 n.6. The reference to the "good cause" requirement of Rule 34—apparently a reference to the pre-1970 version of Fed. R. Civ. P. 34—makes it clear that the court was referring to disclosures requested for purposes of civil litigation, a category of disclosure authorized by Rule 6(e)(3)(C)(i). The *Johnson* footnote thus has nothing to do with the authority of district courts to permit disclosure where Rule 6(e) does not authorize it. Nor did the judgment of the court of appeals in *Johnson* implicitly adopt an "inherent authority" exception to Rule 6(e). The court of appeals in that case simply declined to issue a writ of mandamus expunging a report filed by a federal grand jury. Although the filing of the report in *Johnson* revealed certain matters that had occurred before the grand jury, the court of appeals declined to hold that the nondisclosure provisions of Rule 6(e) had overridden the traditional authority of a grand jury to issue a report rather than, or in addition to, an indictment.

would not be made "preliminary to or in connection with a judicial proceeding," as required by Rule 6(e)(3)(C)(i). 622 F.2d at 171-172. The court added that a district court could not simply ignore the language of the Rule and permit disclosure where there was no judicial proceeding anticipated or pending (*id.* at 172), a holding that was subsequently confirmed by this Court's decision in *United States* v. *Baggot, supra*. While *McDermott* stands for the proposition that district courts may not ignore the language of Rule 6(e) and permit disclosure whenever they deem it appropriate, nothing in the *McDermott* opinion forecloses the "inherent authority" rationale if limited to exceptional circumstances that present a compelling case for disclosure.

This case, and cases like this one, are not exceptional cases, and they do not present a compelling claim for disclosure. Petitioner does not claim that denial of disclosure will work some unfairness in civil or criminal litigation, nor does he suggest that disclosure is necessary to ensure that justice is done in an important public proceeding, see *In re Petition to Inspect and Copy Grand Jury Materials, supra*, or to correct some public misapprehension on a matter of widespread public concern, see *In re Biaggi, supra*. Rather, at bottom, petitioner's request for disclosure is simply a request to increase the total amount of information about past events that is available to the public. Even if dressed up as a significant project of historical scholarship, requests of the type made by petitioner could not easily be distinguished from journalistic inquiries into subjects of public interest or requests based simply on individual or public curiosity. The lower courts therefore properly denied the request for disclosure in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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